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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 16, 2000

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION

CASE NO. PUE990349

Ex Parte: In the matter concerning
the participation of incumbent
electric utilities in regional
transmission entities

ORDER REQUESTING BRIEFING

Sections 56-577 and 56-579 of the Virginia Electric Utility Restructuring Act ("the Act"), Chapter 23 (§ 56-576 et seq.) of Title 56 of the Code of Virginia, require Virginia's incumbent electric utilities to (i) join or establish regional transmission entities ("RTE") by January 1, 2001, and (ii) obtain authorization from the State Corporation Commission ("Commission") to transfer their transmission assets to such RTEs.

The Commission is directed by § 56-579 B to adopt rules and regulations, with appropriate public input, establishing elements of RTE structures essential to the public interest. These elements are to be applied by the Commission in determining whether to authorize the transfer or control of incumbent utilities' transmission assets to RTEs. The

Commission is also directed by § 56-579 A 2 to develop rules and regulations under which incumbent electric utilities owning, operating, controlling, or having an entitlement to transmission capacity within the Commonwealth, may transfer all or part of such control, ownership, or responsibility to an RTE upon certain terms and conditions that the Commission determines will comply with § 56-579 A 2 of the Act.

On January 11, 2000, the Commission issued an order inviting interested persons to file comments on or request a hearing on proposed regulations attached to the Order. Comments and requests for hearing were to be filed on or before February 11, 2000. Virginia Electric and Power Company; AEP-Virginia; Potomac Edison Company, d/b/a Allegheny Power; the Office of the Attorney General's Division of Consumer Counsel; Chaparral (Virginia), Inc.; Old Dominion Electric Cooperative, and the Virginia Maryland & Delaware Association of Electric Cooperatives (filing jointly); the Federal Trade Commission's Bureau of Economics; Kentucky Utilities Company, d/b/a Old Dominion Power Company; the Virginia Committee for Fair Utility Rates and the Old Dominion Committee for Fair Utility Rates (filing jointly); and Dynegy Marketing and Trade filed comments. No party requested a hearing.

In its review of the comments, the Commission notes that among those commenting, AEP and Virginia Power maintain that

many of the proposed regulations' requirements may be preempted by federal law, and suggest potential federal preemption of the underlying grant of authority by the General Assembly to the Commission under §§ 56-577 and 56-579 of the Act to (i) establish elements of RTE structures essential to the public interest, and (ii) determine whether an incumbent electric utility may transfer all or part of the control, ownership or responsibility of its transmission assets to an RTE upon certain terms and conditions, or suggest that the Commission has exceeded its authority under the Act. Although such issues were raised, they were not in every instance analyzed or briefed in detail, with citation to case authority, statutory provisions, etc. Inasmuch as RTEs are a critical component of the operation of Virginia's restructuring legislation, the Commission believes that issues such as these should be addressed in more detail through briefs.

Upon consideration of the foregoing, the Commission is of the opinion that various issues that concern Commission rulemaking authority regarding the transfer of incumbent electric utilities' transmission assets to RTEs, should be briefed by all parties who have filed comments in response to the Commission's January 11, 2000, Order in this proceeding. Such parties are requested to file on or before April 5, 2000, briefs addressing the issues set forth in Attachment A, citing

legal authority supporting their positions. If any parties assert federal preemption of the Commission's rulemaking authority regarding the transfer of incumbent electric utilities' transmission assets to RTEs, they are requested to describe, in light of any such asserted preemption, what they believe to be the Commission's permissible role under the Virginia Electric Utility Restructuring Act, with respect to incumbent electric utilities' transfer of transmission assets to RTEs. Accordingly,

IT IS ORDERED THAT:

(1) On or before April 5, 2000, persons who filed comments in response to the Commission's January 11, 2000, Order in this proceeding are requested to file an original and fifteen (15) copies of their briefs described herein with the Clerk of the Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218-2118, and shall on the same day serve a copy of their brief on the parties listed in the service list for this Order. The Commission Staff may also file a brief conforming to the requirements set forth herein.

(2) No application filed under such RTE regulations that the Commission may finally adopt shall be subject to the May 1, 2000, filing deadline as set forth in proposed regulation 5 VAC 320-120. The Commission will establish such later filing date as may be appropriate.

(3) This matter is continued pending further Order of the Commission.

Attachment A to Commission Order Directing Briefing

The parties are requested to brief the issues listed below.

1. Whether any of the proposed rules exceed the Commission's authority under the 1999 Virginia Electric Utility Restructuring Act ("the Act"). If so, identify each such rule separately and explain how such rule exceeds such authority.
2. Whether any of the authority granted the Commission by the Virginia General Assembly under subdivision A 1 of § 56-579 of the Act, or its exercise, is or may be preempted by federal law.
3. Whether any of the authority granted the Commission by the Virginia General Assembly under subdivision A 2 of § 56-579 of the Act, or its exercise, is or may be preempted by federal law.
4. Whether any of the authority granted the Commission by the Virginia General Assembly under the subsection B of § 56-579 of the Act, or its exercise, is or may be preempted by federal law.
5. Whether any of the proposed rules, or their exercise, is, or may be, preempted under federal law. If so, identify each such proposed rule and explain how such rule is preempted.
6. Whether, and to what extent, the provisions of § 56-579 of the Act, or any part thereof, are applicable to an incumbent electric utility (i) that is presently a member of an RTE, and (ii) whose membership in such RTE was made prerequisite to the Federal Energy Regulatory Commission's approval of the merger of such utility's holding company with another entity.
7. Whether any provision of the Federal Power Act, regulations implementing such act, or case law interpreting either provides that the Federal Energy Regulatory Commission (FERC) has exclusive authority over the ownership, control, acquisition or construction of transmission assets.
8. Whether any provision of the Federal Power Act, regulations implementing such act, or case law interpreting either imposes an unconditional obligation on the Commission to approve or to refrain from reviewing or conditioning incumbent electric utilities' proposed transfer of the management, control or ownership of transmission assets to a FERC-approved RTO.